

<p style="text-align: right;">78</p> <p>1 which there isn't room for a coal stockpile,  2 for coal from the Powder River Basin to be  3 delivered, to then reconfigure your plant so  4 that you can --  5 JUDGE SHEEHAN: You said it's the  6 DEQ's analysis the spur can't be put in. Where  7 is that in the record? I never saw the word  8 "spur" --  9 MR. GORDON: I don't -- you're not  10 going to find --  11 JUDGE SHEEHAN: Or any other railroad  12 issues you're talking about.  13 MR. GORDON: You won't find that in  14 the record. I think you're right. The DEQ's  15 presentation of this issue is that in order for  16 Powder River Basin coal to be an available  17 option, for it to be BACT would entail  18 redesigning the source. That is in the record.  19 That's in the response to comments.  20 JUDGE WOLGAST: And then you rely on  21 the Prairie State decision for that position.  22 But it strikes me that that's a much broader</p>	<p style="text-align: right;">80</p> <p>1 would involve a physically substantial  2 reconfiguration of that entire facility. So  3 that rather than having a conveyor taking  4 coal straight from the mine and feeding it  5 right into the boiler, you'd have to have  6 some other kind of configuration for not only  7 receiving, storing it, and feeding it into  8 the boilers. I think that aspect of the 7th  9 Circuit analysis is applicable here, too.  10 The same kind of reconfiguration would be  11 applied.  12 Would it be -- is it the same sort  13 of raison d'etre argument? Is that analogous  14 here? No. But the substantial  15 reconfiguration and physical redesign of the  16 plant is what would be required, and that's  17 why it's off the table for purposes of the  18 BACT analysis here.  19 JUDGE SHEEHAN: Can we move to the  20 increment issue?  21 MR. GORDON: Yes.  22 JUDGE SHEEHAN: The regs., 21(b)(13)</p>
<p style="text-align: right;">79</p> <p>1 reading of this application were it so would be  2 a much larger reading of redesign. And what we  3 found were the 7th Circuit considered in Prairie  4 State. I mean, they are -- the power plant  5 would never have been built but for the fact it  6 was used in the contiguous and co-online  7 facility. And here you're talking about  8 reconfigurations, but I think, as Counsel  9 pointed out, the 7th Circuit didn't seem to  10 embrace any reconfiguration as equating  11 redesign.  12 MR. GORDON: I think that my review of  13 that decision was that it was -- you're right,  14 in a very, very broad macro level, I mean, the  15 plant wouldn't have been going -- a sort of  16 raison d'etre for that plant was that it was a  17 mine-mouth plant.  18 But in addition, I think an  19 important part of that analysis was that even  20 if the facility could have -- was achievable  21 in some general fashion, accepting coal from  22 some other place, it emphasized that to do so</p>	<p style="text-align: right;">81</p> <p>1 and 21(c) seem to call for the increment  2 calculation to be based on a 24-month  3 calculation pre-mod. In this case, it would be  4 the WEPCO-PIPP facility. Twenty-four months  5 pre-mod and 24 months post-mod. And then you  6 compare those and the difference. If it's -- an  7 increase is the portion that consumes increment.  8 Why did you just simply take 1973 and 2006 and  9 compare those emissions, which seems arbitrary  10 and it's certainly not the 24-month period.  11 MR. GORDON: Well, the 1973 emissions  12 reported emissions that are prior to the major  13 source baseline date of January 6, 1975 -- then  14 the comment that was submitted by Petitioner was  15 that there were modifications made to the  16 Presque Isle Power Plant from Wisconsin Electric  17 that were not included in the analysis as -- and  18 they should have been included in the analysis.  19 Those alleged modifications took place in 1999,  20 and that's in their comments.  21 And so the most reported emissions  22 are from 2006. Michigan has its annual</p>

21 (Pages 78 to 81)

<p style="text-align: right;">82</p> <p>1 emission reporting forms, and that those were  2 -- the emissions that were reflective and  3 representative of the emissions  4 post-modification. And so that's the  5 comparison is baseline versus what is  6 increment-consuming post-baseline.  7 JUDGE SHEEHAN: But the regs seem to  8 say -- and I'm reading from the regs here  9 at.21(b)(21) -- that the average rate times per  10 year consecutive 24-month period preceding a  11 particular date, which is representative. So  12 the 24-month block, period. It seems to me what  13 the regs call for -- and you seem to have just  14 taken one year versus another year and left it  15 at that.  16 MR. GORDON: Yes. And I conferred  17 with my colleagues over at the DEQ on that  18 issue. And I said, well, why did you look at  19 just the 2006 emissions as opposed to the  20 consecutive 24-month period, which is I think  21 the point that you're getting at. And they did  22 not. I'm not going to say that they did because</p>	<p style="text-align: right;">84</p> <p>1 MR. GORDON: No, I don't think that  2 that general -- the specific issue, if you look  3 at their comments was as to this argument  4 regarding what emissions should be excluded from  5 our increment-consuming and not was the 2006  6 data wrong? In fact, actually if you look at  7 their own brief, I think they give a range of  8 what emissions should be excluded, and they  9 relied on that same 2006 Maer's, M-a-e-r,  10 report. So I don't think -- that issue was not  11 presented in there, in their comments or in the  12 petition for review. And so then it's not  13 preserved for appeal.  14 But this -- you know, the argument  15 anyhow, and I don't mean to beat this, but  16 the -- they're essentially wanting to have  17 the Board ignore that portion of the rule  18 that says emissions from any major source on  19 which construction commenced after the major  20 source baseline bid -- they'd have them  21 rewrite that provision to just say -- what is  22 increment-consuming? It's just actually</p>
<p style="text-align: right;">83</p> <p>1 the record's clear that they looked at just the  2 2006.  3 But, frankly, that's not the  4 argument the Petitioner is making here. So,  5 I mean, the issue that's presented on appeal  6 in this petition for review is that all of  7 the emissions from the Presque Isle Power  8 Plant after the major source baseline date  9 should be excluded from the baseline and  10 should be considered increment-consuming.  11 The issue that there was some error  12 because he didn't take the 24-month  13 representative -- most recent 24-month  14 consecutive period as opposed to the 2006  15 emissions, frankly, was never presented to  16 DEQ. It's not raised in this petition for  17 review, and that's not the issue that I think  18 is before the Board.  19 JUDGE WOLGAST: Isn't it generally in  20 the regs that the requirements of Section 52.21  21 aren't followed here, which would include the  22 contemporaneous data issue?</p>	<p style="text-align: right;">85</p> <p>1 emissions from any major stationary source.  2 It doesn't say that. It has that important  3 second phrase: from any major source on which  4 construction has commenced after the major  5 source baseline date. They're essentially  6 asking you to ignore that second phrase and  7 rewrite it, and that's not the way it's  8 supposed to be interpreted. And the workshop  9 manual doesn't interpret it that way either.  10 JUDGE SHEEHAN: Okay. Can we go to  11 modeling? We discussed earlier, of course, what  12 the Sierra Club is driving at in terms of  13 getting down to hourly limits or very close to  14 hourly limits to meet the NAAQS and increment  15 compliance standard average periods. Although  16 your response to comments really didn't provide  17 much information at all, you just said that  18 hourly emissions are limited by the size of the  19 equipment. Sounds rather nonresponsive  20 actually. Your brief went into more detail and  21 pointed to places in the record where you say  22 you had done the calculation to the tune of 87</p>

22 (Pages 82 to 85)

<p style="text-align: right;">86</p> <p>1 or 88 pounds per hour, to take the SO2 example</p> <p>2 How is it -- I'm looking at page 24</p> <p>3 of your application where that calculation</p> <p>4 was done. You say -- even accepting as true</p> <p>5 that it is 87 or 88 pounds per hour, you say</p> <p>6 in the footnote to that chart on page 24 that</p> <p>7 it's based on a 92 percent reduction. I</p> <p>8 presume that's the limestone reduction</p> <p>9 referred to elsewhere.</p> <p>10 MR. GORDON: You're referring to the</p> <p>11 permit application?</p> <p>12 JUDGE SHEEHAN: Permit application,</p> <p>13 page 24.</p> <p>14 MR. GORDON: Twenty-four, thank you</p> <p>15 JUDGE SHEEHAN: The chart, Table</p> <p>16 4.4-1. Okay, have that?</p> <p>17 MR. GORDON: Thank you, yes.</p> <p>18 JUDGE SHEEHAN: Footnote 1 premises</p> <p>19 the calculation on 92 percent reduction. Where</p> <p>20 is it enforceable in the permit that there will</p> <p>21 be this 92 percent reduction so that that figure</p> <p>22 has meaning or reality?</p>	<p style="text-align: right;">88</p> <p>1 that it should be based on uncontrolled</p> <p>2 emissions. They point that it's not 87</p> <p>3 pounds per hour, but instead it's</p> <p>4 500-and-some-odd pounds per hour. And that's</p> <p>5 based on an uncontrolled rate. The reality</p> <p>6 is that the permit requires them to operate</p> <p>7 the baghouse fabric filter at all times in</p> <p>8 proper operating conditions.</p> <p>9 JUDGE SHEEHAN: Well, looking more</p> <p>10 deeply at footnote 1 there, the second sentence</p> <p>11 of it, page 24, "The limits above are also based</p> <p>12 on a 30-day rolling average." Now, Sierra</p> <p>13 Club's concern was that a long-term average like</p> <p>14 that can help blunt or smooth out or steer</p> <p>15 spikes, one-hour, two-hour, three-hour spikes</p> <p>16 that are at the core of the NAAQS increment</p> <p>17 compliance standards. So how does your</p> <p>18 statement that this is based on a 30-day average</p> <p>19 align with the chart's seeming conclusion that</p> <p>20 this is a one-hour rate?</p> <p>21 MR. GORDON: I am not sure why that</p> <p>22 last sentence in there says the limits -- when</p>
<p style="text-align: right;">87</p> <p>1 MR. GORDON: The 92 percent reduction</p> <p>2 is from the -- that is the required control</p> <p>3 efficiency or reduction, if you will, that is</p> <p>4 set forth in the New Source Performance Standard</p> <p>5 that's applicable to this facility. And I'm</p> <p>6 going to -- I'm having trouble putting a finger</p> <p>7 on a general condition, but it's -- you know,</p> <p>8 the -- the permittee is required to -- it says</p> <p>9 actually, "general condition no. 8." It says,</p> <p>10 no, they're not exempt from complying with any</p> <p>11 of the applicable requirements under the federal</p> <p>12 Clean Air Act.</p> <p>13 And so they -- to the extent that</p> <p>14 there are other requirements, like fuel</p> <p>15 source performance standards that the company</p> <p>16 -- permit applicant has to satisfy, those are</p> <p>17 -- there's a general condition that requires</p> <p>18 them to do that, too. And so the 92 percent</p> <p>19 reduction is something that's required. They</p> <p>20 have to meet it under NSPS.</p> <p>21 The Sierra Club's argument that we</p> <p>22 should be looking at increment consumption is</p>	<p style="text-align: right;">89</p> <p>1 it says they are also based on a 30-day rolling</p> <p>2 average, well, that is true. There is a</p> <p>3 separate emission limit base, so that is a</p> <p>4 30-day rolling average. What I do know is that</p> <p>5 the modeling was based on maximum hour</p> <p>6 emissions. And I think -- and based on the</p> <p>7 design and capacity of the plant, using a</p> <p>8 baghouse fabric filter operating in the 92</p> <p>9 percent control efficiency. I don't think that</p> <p>10 last sentence is attempting to say that the,</p> <p>11 what is it, 87.8 pounds per hour limit the --</p> <p>12 not limit, emission rate that was used for</p> <p>13 modeling purposes is derived from a 30-day</p> <p>14 rolling average. And in fact, when you look at</p> <p>15 the permit application, I don't think that that</p> <p>16 is, in fact -- that's not what happened.</p> <p>17 They're relying instead on what I've just said,</p> <p>18 that it's an hourly rate.</p> <p>19 JUDGE SHEEHAN: Now going into the</p> <p>20 monitoring issue. Here, as alluded to earlier</p> <p>21 when the Sierra Club was speaking, you have the</p> <p>22 receptor grid layout, the 5-kilometer radius</p>

23 (Pages 86 to 89)

<p style="text-align: right;">90</p> <p>1 grid from Appendix C of the permit application,  2 which looks very tight and close to the actual  3 NMU site. But what you offered up in your  4 pleadings was the background concentration  5 sheet, the so-called August 21, 2006 e-mail that  6 I presume MDEQ sent to NMU to satisfy the  7 ambient air monitoring requirement.  8       So are you relying on the -- is  9 your analysis based on a 5-kilometer study or  10 on the background concentration study, which  11 seems far vaster in terms of distance from  12 NMU?  13       MR. GORDON: Relying on the  14 information that DEQ sent them in that August  15 2006. I don't believe that this receptor grid  16 layout diagram is really to what is the  17 background concentration for determining  18 increment consumption here and in Marquette. I  19 think it's for a different purpose altogether.  20       JUDGE SHEEHAN: Okay. Well, then  21 turning to the back of the concentration sheet,  22 it shows us distances of NMU's as close in as or</p>	<p style="text-align: right;">92</p> <p>1       MR. GORDON: Right. Is there anything  2 written in the record where there's something  3 from DEQ saying that it actually looked at --  4 presented a written analysis that says this --  5 these -- is current? No. I mean, it just  6 presented it to them because it's current.  7 Similarly, is there any -- something, a written  8 document laying out that it looked at location  9 and accuracy?  10       And the answer -- and I think what  11 it is, is it's basically, it is implicit and  12 demonstrated from what actually happened  13 here. The company -- excuse me, the  14 university -- submitted their request for  15 data. They knew what the requirements were  16 that needed to be representative of what the  17 air quality is in Marquette County and  18 Marquette at this plant.  19       DEQ reviewed the available  20 information, was aware of all those  21 requirements, and provided information that  22 it thought was representative of the air</p>
<p style="text-align: right;">91</p> <p>1 far out, depending on how you look at it, as  2 65 kilometers up to about 316 for lead in  3 Milwaukee. How is it that distances of this  4 scope, so far out or close in depending on your  5 point of view, satisfy the NSR Manual standards  6 for monitor location, data quality, and so on?  7       MR. GORDON: The request came in in  8 the summer of 2006. The data that was provided  9 by DEQ is for the most recent three years.  10 Information you'll see on that same sheet, that  11 is 2003, 2004, and 2005. So I don't think  12 there's any real dispute as to whether or not  13 the data that DEQ provided to them is current or  14 not.  15       JUDGE SHEEHAN: But the manual lays  16 out very strict requirements about how you  17 satisfy currency and location and quality.  18 Detailed requirements. And all we've got -- we  19 have from you is a one-page document that  20 doesn't seem to address any of them at all. It  21 just throws out these numbers without any  22 analytical foundation for them.</p>	<p style="text-align: right;">93</p> <p>1 quality.  2       JUDGE SHEEHAN: But how do we credit  3 that? It looks very random and there's no  4 particular framework undergirding it that would  5 give us any confidence that it does reflect a  6 careful consideration of the location factors  7 and the currency factors and the quality  8 factors. It just looks like something thrown  9 out because somebody happened to have it, and he  10 needed to have something to check this box. Why  11 should we give it any deference? There's no  12 analysis to support that.  13       MR. GORDON: Because I think one -- I  14 think the reasonable inference is that when a  15 permit applicant asks DEQ for representative  16 data that he can use for modeling, DEQ then  17 reviews its available information, selects what  18 it thinks is representative. It doesn't just  19 select stuff and give it to the company when  20 it's random, you know. And so they selected  21 information from -- for example, Escanaba, Two  22 Rivers, Green Bay, Milwaukee because that</p>

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<p style="text-align: right;">94</p> <p>1 information is representative, or even more --</p> <p>2 actually, it's more conservative than the air</p> <p>3 quality from Marquette because it's coming from</p> <p>4 urban areas that are much, much larger and have</p> <p>5 higher pollutant concentrations than what's</p> <p>6 present in Marquette. But the prevailing wind</p> <p>7 directions are actually not sending pollutants</p> <p>8 up towards Marquette, but actually sending it in</p> <p>9 areas that -- it's going to be lower in</p> <p>10 Marquette than it would be here. So if anything</p> <p>11 --</p> <p>12 JUDGE SHEEHAN: But we wouldn't know</p> <p>13 that if there's nothing in the record to tell us</p> <p>14 what you're saying.</p> <p>15 MR. GORDON: It is because it's</p> <p>16 implicit. And I think actually --</p> <p>17 JUDGE REICH: In regard to that, were</p> <p>18 the issues about the representativeness of the</p> <p>19 data -- relative to say, for example, location</p> <p>20 of the surrogate -- were those issues raised</p> <p>21 during the comment period? And if so, you know,</p> <p>22 response to comments, did you not have to</p>	<p style="text-align: right;">96</p> <p>1 cursory fashion? I'm not going to deny that</p> <p>2 it wasn't addressed in a somewhat cursory</p> <p>3 fashion.</p> <p>4 JUDGE REICH: I was a little confused</p> <p>5 because on the one hand -- I mean, you do say</p> <p>6 there was no waiver, but on the other hand, it</p> <p>7 seems like there was a waiver.</p> <p>8 MR. GORDON: No, no written waiver is</p> <p>9 what the response is. They didn't actually</p> <p>10 submit something in writing, which would then</p> <p>11 prompt the DEQ.</p> <p>12 JUDGE REICH: So you think there was</p> <p>13 an oral waiver at the time?</p> <p>14 MR. GORDON: Well, not -- I mean, I</p> <p>15 think --</p> <p>16 JUDGE REICH: Or you just sort of</p> <p>17 treated it as if waived?</p> <p>18 MR. GORDON: When the company is</p> <p>19 requesting information as to what model -- what</p> <p>20 background concentrations it should use for its</p> <p>21 modeling, both as to PSD increment consumption</p> <p>22 and NAAQS, and the DEQ provides this</p>
<p style="text-align: right;">95</p> <p>1 actually address those issues at that point,</p> <p>2 even if they -- and I'm looking kind of implicit</p> <p>3 up until that point? Did they not require you</p> <p>4 to articulate why in fact they were</p> <p>5 representative? And isn't that what we should</p> <p>6 be looking to to see if the position you're</p> <p>7 taking is sustainable or not?</p> <p>8 MR. GORDON: I think -- excuse me, I'm</p> <p>9 trying to keep track of all the different facts</p> <p>10 and everything that's happening in this case. I</p> <p>11 think there was -- it was raised. There was a</p> <p>12 response to comments. It's at page 15, and</p> <p>13 talks about how the DEQ's experience with</p> <p>14 monitoring in the area -- and says the DEQ</p> <p>15 didn't require pre-construction monitoring.</p> <p>16 There was no written waiver requested by the</p> <p>17 permit application -- by the permit applicant,</p> <p>18 so he didn't lay out in detail -- go through</p> <p>19 each of those three criteria that are in the</p> <p>20 manual. But it was raised, it was addressed in</p> <p>21 the response to comments.</p> <p>22 Was it addressed in a somewhat</p>	<p style="text-align: right;">97</p> <p>1 information, it's saying, you know -- and then</p> <p>2 you look to see if the modeling shows that it's</p> <p>3 not exceeding the significant impact levels and</p> <p>4 then a full-blown increment analysis isn't</p> <p>5 needed because instead, you've satisfied some</p> <p>6 threshold level on the preliminary analysis.</p> <p>7 I just want to raise one more point</p> <p>8 here. I think -- I think that the exchange</p> <p>9 of information, the request and then the</p> <p>10 providing of the data here, I don't think</p> <p>11 that rises to the level of clear error, you</p> <p>12 know. I mean, what could happen is if you</p> <p>13 were to remand on this issue, what would</p> <p>14 happen is that the DEQ would then write a</p> <p>15 letter, as it has done with other applicants</p> <p>16 where they have actually requested something</p> <p>17 in writing, saying, yep, it needs</p> <p>18 currentness, it needs accuracy, and it needs</p> <p>19 monitoring location.</p> <p>20 Remand is not appropriate when the</p> <p>21 permitting of an agency is simply going to</p> <p>22 restate the explanations that are offered on</p>

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<p style="text-align: right;">98</p> <p>1 appeal. And where there's explanations --</p> <p>2 JUDGE REICH: Just out of curiosity,</p> <p>3 when you write letters like that, is that all we</p> <p>4 say or do we say it needs it because? Is there</p> <p>5 any explanation in those letters as to how</p> <p>6 you've determined any such criteria, or is it</p> <p>7 just recycled --</p> <p>8 MR. GORDON: I think it lays out the</p> <p>9 same things that I've just laid out here. They</p> <p>10 are -- it is current because it's 2003, 2004,</p> <p>11 2005. It's representative because those monitor</p> <p>12 locations are from areas where the air -- the</p> <p>13 pollutant concentrations are at least as high --</p> <p>14 are higher, in fact, than what they would be at</p> <p>15 Marquette; and that the prevailing wind</p> <p>16 directions are such that it was -- it's going to</p> <p>17 be less than it is in Marquette; that those</p> <p>18 monitors are actually accurate regarding the</p> <p>19 number of the monitors that were used, the</p> <p>20 accuracy of the monitors that were used, that</p> <p>21 the quality of that data is sufficient.</p> <p>22 The DEQ lays out in writing exactly</p>	<p style="text-align: right;">100</p> <p>1 there was some discussion about that. The BACT</p> <p>2 analysis that needs to be performed on a</p> <p>3 case-by-case basis, on the project that was</p> <p>4 proposed by the applicant. And in this case, I</p> <p>5 think the case-by-case is more important that it</p> <p>6 is in a usual case. If you look at the map</p> <p>7 behind me, you can see this is on the southern</p> <p>8 shore of Lake Superior. It's far from the</p> <p>9 north, and there's been some questions raised</p> <p>10 about the weather. I think what's happening in</p> <p>11 many instances is people who live up there day</p> <p>12 to day have some understanding of what goes on</p> <p>13 and perhaps don't think about the fact that they</p> <p>14 need a document and all the various details.</p> <p>15 With respect to the case-by-case</p> <p>16 analysis, the specific factors are that this</p> <p>17 is a rural location. This is a dedicated</p> <p>18 plant. It's not going to be tied into the</p> <p>19 grid. It has a very harsh climate in the</p> <p>20 wintertime. There's a small slip space to</p> <p>21 store fuel. You saw the map and you asked</p> <p>22 questions. There's a parking lot there.</p>
<p style="text-align: right;">99</p> <p>1 what I'm stating here today.</p> <p>2 JUDGE SHEEHAN: Is it true that the</p> <p>3 monitoring was not done for CO and PM and NOX</p> <p>4 because the SIL or the SMC line wasn't</p> <p>5 triggered? Is that accurate?</p> <p>6 MR. GORDON: Yes.</p> <p>7 JUDGE SHEEHAN: Then where is it in</p> <p>8 the record that shows how you decided that that</p> <p>9 line was not crossed and no analysis needed to</p> <p>10 be done?</p> <p>11 MR. GORDON: It's in their permit</p> <p>12 application. I don't have it in front of me. I</p> <p>13 think in the modeling file, there is some little</p> <p>14 -- DEQ taking the information that was provided</p> <p>15 to the agency by Northern Michigan University</p> <p>16 and determining whether or not in fact those</p> <p>17 significant impact levels were exceeded. And if</p> <p>18 they're not -- the preliminary analysis is</p> <p>19 sufficient.</p> <p>20 JUDGE SHEEHAN: Thank you. Mr. Finto?</p> <p>21 MR. FINTO: Good morning. I thought I</p> <p>22 might pick up first with the fuel issues since</p>	<p style="text-align: right;">101</p> <p>1 There is a staging area, which is basically</p> <p>2 trucks turn around in that area when they're</p> <p>3 delivering things. So there is limited space</p> <p>4 there.</p> <p>5 These utilities are less than a</p> <p>6 mile away. In terms of thinking about the</p> <p>7 fuel supply in this case, we have an amount</p> <p>8 of wood up there. It can be gotten from a</p> <p>9 lot of locations. It's going to have to come</p> <p>10 in to the plant from a lot of locations to</p> <p>11 supply a 10 megawatt plant.</p> <p>12 The coal, on the other hand, needs</p> <p>13 to come from nearby sources in the wintertime</p> <p>14 because of the weather. One of the things</p> <p>15 that's not in the record, but the fact of the</p> <p>16 matter is that the utilities get their fuel</p> <p>17 by barge. That barge will stop running in</p> <p>18 November, so they've got to stop and</p> <p>19 stockpile for the wintertime.</p> <p>20 The university has been greatly</p> <p>21 accommodated by these utilities. In fact, if</p> <p>22 they didn't have this accommodation -- and</p>